

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANET D. MOSLEY)	
Claimant)	
VS.)	
)	
STATE OF KANSAS)	Docket No. 1,024,715
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Claimant appeals the October 14, 2010, Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded a 43.5 percent permanent partial impairment to claimant's right leg on a functional basis for injuries suffered to her right knee on July 21, 2005. Claimant was denied benefits for alleged injuries to her left knee and right shoulder.

Claimant appeared by her attorney, James R. Shetlar of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Bryce D. Benedict of Topeka, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on January 21, 2011. Tom Arnhold was appointed as Board Member Pro Tem for the purposes of this appeal.

ISSUES

1. Did claimant suffer personal injury by accident to her left knee which arose out of and in the course of her employment with respondent? Claimant contends that she injured both her left knee and her right knee on July 21, 2005, when she fell on some waxed steps. Claimant further contends that this accident and the resulting altered gait from the right knee injury aggravated her preexisting degenerative

condition in her left knee. Respondent contends that the left knee condition was preexisting, with no aggravation from the fall.

2. If claimant did prove that she suffered personal injury by accident to her left knee that arose out of and in the course of her employment with respondent, what is the nature and extent of claimant's left knee injury?
3. Did claimant suffer personal injury by accident to her right shoulder which arose out of and in the course of her employment with respondent? Claimant contends that using both a walker and crutches after her right knee injury and during treatment injured her right shoulder. Respondent argues that claimant neither sought nor received any treatment to her right shoulder. Additionally, claimant suffered a prior right shoulder injury resulting in surgery in 1993. The ALJ found claimant's argument that the right shoulder was somehow aggravated lacked support within the medical information and claimant's testimony was not credible.
4. If claimant did prove that she suffered personal injury by accident to her right shoulder which arose out of and in the course of her employment with respondent, what is the nature and extent of claimant's right shoulder injury?
5. What is the nature and extent of the injury suffered to claimant's right knee? Claimant contends that the 50 percent impairment to the right leg offered by board certified orthopedic surgeon James A. Stuckmeyer, M.D., is the most credible. Respondent argues that the opinion of board certified orthopedic surgeon Edward J. Prostin, M.D., that claimant suffered a 37 percent functional impairment to the right leg, more properly follows the fourth edition of the *AMA Guides* and should be adopted by the Board.

FINDINGS OF FACT

Claimant was employed as a maintenance worker for respondent at the Kansas School for the Blind. As part of her duties, she performed electrical, plumbing, painting and other maintenance type work. On July 21, 2005, while she was walking down some steps, claimant slipped and landed on her knees. She first sought treatment with Gregory Bono, M.D., on July 21, 2005. Her treatment was then transferred to orthopedic surgeon Vincent H. Key, M.D., at the University of Kansas Medical Center. There, claimant underwent surgery consisting of partial medial and lateral meniscectomies to the right knee. After the surgery, claimant used a walker for a time and later used crutches. Claimant contends that the walker and crutches aggravated an underlying condition in her right shoulder. In December 2005, Dr. Key returned claimant to work with respondent without restrictions, finding that claimant had reached maximum medical improvement

(MMI). Claimant returned to respondent in a different capacity, as an industrial arts teacher. At the time of the regular hearing, claimant continued working for respondent in that capacity.

On December 14, 2007, claimant was seen by Dr. Key with bilateral knee symptoms. In April 2008, claimant returned to Dr. Key with, what he described, as a new complaint of left knee pain. Claimant was diagnosed with bilateral knee degenerative joint disease, with the left knee more symptomatic than the right. Claimant was recommended to undergo both a left knee arthroplasty and a right knee arthroplasty. The left knee replacement arthroplasty was accomplished at the University of Kansas Hospital on August 13, 2008, with the right knee arthroplasty accomplished on August 20, 2008, both under the hand of Dr. Key. Claimant was found to be at MMI on October 16, 2009, and released to full duty. As noted above, claimant continued as an industrial arts teacher with respondent at the time of the regular hearing on August 5, 2010.

Claimant was referred by her attorney to board certified orthopedic surgeon James A. Stuckmeyer, M.D., on February 15, 2010. Claimant's history to Dr. Stuckmeyer indicated a fall on July 21, 2005, when claimant injured her right knee and right shoulder. The left knee injury history involved a separate incident (that occurred in 1999) involving a cord that claimant allegedly fell over, which resulted in a left knee arthroscopy. The medical records from KU MedWest Occupational Health Clinic from July 21, 2005, discussed a slip and fall involving both knees, with the right sustaining a mild contusion and right piriformis strain, and the left involving only a mild contusion. An MRI scan of the right knee on August 1, 2005, revealed a complex tear in the body and anterior horn of the lateral meniscus with probable displaced bucket handle tear. The surgery above described under the care of Dr. Key then commenced on August 23, 2005. Claimant recuperated, displaying only minimal complaints in the right knee on September 20, 2005. By December 6, 2005, claimant had reached MMI and was released by Dr. Key to return to full work status.

Claimant apparently continued experiencing problems with her right knee. She was examined by Steven T. Joyce, M.D., at the Dickson-Diveley Midwest Orthopaedic Clinic on April 27, 2006. Claimant was diagnosed with a possible Baker's cyst, and another MRI was recommended. Claimant returned to Dr. Key and underwent a series of injections and physical therapy treatments. Claimant continued to experience pain in the knee through September 18, 2007. At that time, Dr. Key recommended a right total knee arthroplasty due to claimant's failure to respond to conservative modalities. By December 14, 2007, claimant began complaining of left knee pain as well. Claimant was then diagnosed with bilateral knee degenerative joint disease, leading eventually to the total knee replacement surgeries.

Claimant advised Dr. Stuckmeyer that she had injured both knees in the fall in 2005. She also advised that she had aggravated her preexisting right shoulder problems as the result of the fall. Dr. Stuckmeyer assessed claimant a 50 percent impairment to each knee as the result of the injuries suffered with respondent. He determined that claimant had experienced only a fair operative result from the total knee replacements. Dr. Stuckmeyer noted claimant's medical history of right shoulder surgery, including a rotator cuff repair, and assessed claimant a 15 percent impairment to the right shoulder for this preexisting shoulder condition. He then assessed claimant an additional 5 percent impairment to the right shoulder from the July 21, 2005, fall. He testified that all impairments were pursuant to the fourth edition of the *AMA Guides*.¹

On cross-examination, Dr. Stuckmeyer admitted that he was not provided any medical records specific to the original left knee arthroscopy. When further questioned on cross-examination, Dr. Stuckmeyer also admitted that he did not determine the points of result, utilized by the *AMA Guides* in Table 66 of the *Guides*, when determining the level of pain claimant was feeling or the range of motion limitations in her knees. He agreed that there were no medical records indicating treatment for the left knee between the July 21, 2005, accident and December 2007. He also agreed that claimant failed to mention problems associated with using crutches. When questioned regarding the need for the total left knee replacement, Dr. Stuckmeyer identified degenerative joint disease as the cause. When asked to identify the reason for the 5 percent rating to the right shoulder, he identified his "experience and her subjective complaints" as the cause.² He was unaware of claimant's range of motion limitations prior to her previous arthroscopic surgery. He admitted that he had no way to determine if claimant had gained or lost range of motion in the right shoulder.

Claimant was referred by respondent to Dr. Prostic for an independent medical examination (IME) on April 19, 2010. Claimant provided Dr. Prostic with a history including the fall and injuries to her knees. There was no mention of the right shoulder. Dr. Prostic was provided with several of Dr. Key's medical reports detailing the right knee surgery. The reports also discussed the followup treatments, beginning in 2007 with the injections, physical therapy and, ultimately, bilateral total knee replacements. Claimant reported an excellent outcome from the right knee replacement. She continued to experience symptoms in the left knee, including difficulties bending, with ongoing and constant aching. Dr. Prostic assessed claimant a 37 percent impairment to the right knee following a good result from the surgery. This rating was pursuant to the fourth edition of the *AMA Guides*.³

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² Stuckmeyer Depo. at 34.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Prostic opined that the osteoarthritis in claimant's right knee was accelerated due to the accident and resulting surgery. Dr. Prostic was unable to find any medical records detailing treatment of the left knee between the July 21, 2005, fall and claimant's return to Dr. Key. Dr. Prostic determined that the need for the left knee replacement was the osteoarthritis and degeneration in the knee.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁷

It is undisputed that claimant suffered an accidental injury on July 21, 2005, to her right knee. Additionally, the record supports a finding that claimant at least temporarily

⁴ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2005 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

bruised her left knee as well. However, the record does not support a finding that claimant, in any way, injured her right shoulder on that date. Claimant provided no history to Dr. Stuckmeyer of problems associated with the use of crutches and her right shoulder. Additionally, there is no record of claimant requesting or receiving medical treatment for the shoulder. Finally, Dr. Stuckmeyer had no information regarding claimant's prior shoulder surgery, including any range of motion findings from that original injury. The ALJ found it incredible that claimant could claim such an injury without any need for medical treatment and with the shoulder history claimant displayed. The ALJ found the evidence supporting claimant's allegations to not be credible and denied claimant's request for a permanent impairment for the right shoulder. The Board agrees. The denial of benefits for claimant's alleged right shoulder injury is affirmed.

With regard to the left knee, the ALJ also found claimant's contentions to lack credibility. Dr. Prostic found the need for the left knee replacement to stem from the degenerative condition in claimant's knee. The minor contusion from the fall does not support a permanent injury. Additionally, claimant went from July 2005 to December 2007 without seeking medical treatment for the left knee. Dr. Stuckmeyer also described a separate injury to the left knee involving a cord that claimant tripped over in 1999. The history and events associated with claimant's left knee claim do not support the request for a permanent impairment from the accident on July 21, 2005. The denial of benefits by the ALJ for the left knee is affirmed.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁸

The statute requires that a permanent impairment be established pursuant to the fourth edition of the *AMA Guides*.⁹ The rating of Dr. Stuckmeyer, by his own admission, stems from his experience. The rating procedures from the fourth edition of the *AMA Guides* appear to have been omitted during his evaluation of claimant. The Board finds the opinion of Dr. Prostic to be the most credible in this instance. The award for claimant's right knee is adjusted to a 37 percent impairment to the right lower extremity.

⁸ K.S.A. 44-510e(a).

⁹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the denial of benefits for the alleged injuries to claimant's right shoulder and left knee, and modified with regard to the award to the right knee. Claimant's award is modified to grant a 37 percent permanent partial impairment to the right lower extremity at the level of the leg. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings contained herein.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 14, 2010, should be, and is hereby, affirmed with regard to the denial of benefits for claimant's right shoulder and left leg, and modified to find that claimant suffered a 37 percent permanent partial impairment to the right lower extremity at the level of the leg for the injuries suffered on July 21, 2005.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Janet D. Mosley, and against the respondent, the State of Kansas, and its insurance carrier, the State Self-Insurance Fund, for an accidental injury which occurred on July 21, 2005, and based upon an average weekly wage which guarantees claimant the maximum weekly benefit of \$467.00.

Claimant is entitled to 48.29 weeks of temporary total disability compensation at the rate of \$467.00 per week totaling \$22,551.43, followed by 56.13 weeks permanent partial disability at the rate of \$467.00 per week totaling \$26,212.71 for a 37 percent permanent partial disability to the right leg on a functional basis, making a total award of \$48,764.14.

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts already paid.

IT IS SO ORDERED.

Dated this ____ day of February, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge